The Commonwealth of Massachusetts

OFFICE OF THE DISTRICT ATTORNEY
FOR THE NORFOLK DISTRICT

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May 30, 2018

Justice Paula M. Carey
Chief Justice
Trial Court of Massachusetts
One Pemberton Square
Boston, MA 02108

Dear Justice Carey,

I write to ask you to take three actions relative to the Advisory Sentencing Guidelines issued by the Massachusetts Sentencing Commission, but not "enacted into law" by the Legislature, G.L. c. 211E, § 3(a)(1). As the current president of the Massachusetts District Attorneys Association ("MDAA"), I write to express three main concerns.

First, by issuing those guidelines even though they have not been enacted by the Legislature, the Sentencing Commission is leading judges to mistakenly believe they are binding. They are not. See Commonwealth v. Laltaprasad, 475 Mass. 692, 696-703 (2016). It is the province of the Legislature to set penalties for crimes. Id. at 703. For a sentencing judge or a judicial commission to usurp that authority would violate the separation of powers, Mass. Decl. of Rights, art. 30.

Second, the guidelines are being issued without the minority report proposed by the two Assistant District Attorneys who are voting members of the Sentencing Commission and who represent the MDAA pursuant to G.L. c. 211E, § 1(a). A copy of that minority report voted and reflective of the MDAA's position is attached. In a May 15, 2018 email (copy attached), the former Chair of the Sentencing Commission informed those prosecutor members that they could "submit the minority report" by May 24, to be included with the published report of the Sentencing Commission, and "[i]t does not require approval of the commission." However, after defense members objected to the minority report merely because it was printed on MDAA letterhead and included input from the MDAA, it was to be omitted. The two Assistant District Attorneys were selected by and recommended to serve by the MDAA which is specifically mentioned in the statue. This stifling of dissent is unfair, unjust and undemocratic. It violates the approval process outlined in G.L. c. 211E, § 3(a)(1). It gives the impression that the product of the Sentencing Commission was unanimous, when in fact there was significant opposition.

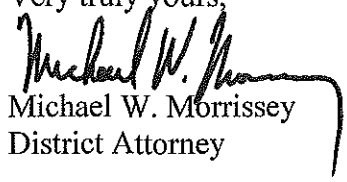
Third, based on emails from the former Chair, it is my understanding that the Sentencing Commission's version of the guidelines – without the minority report – will be submitted to the

Flaschner Judicial Institute for use in judicial trainings this summer and fall. This is alarming, because it is likely to lull inexperienced judges into thinking that they should sentence based on that incomplete report, and on the guidelines not adopted by the Legislature as required by law. I suggest that any judicial training on sentencing should include the perspectives of one or more Assistant District Attorneys, so that judges may understand the complexity of the issues and the parameters of their discretion. District Attorneys do not want to be in the position of having to appeal illegal sentences, or of having to explain to crime victims sentences that do not take into account their perspectives as required by G.L. c. 258B, § 3.

For those reasons, I ask that you, as Chief Justice of the Trial Court: (1) prevent distribution to trial judges of the incomplete report of the Sentencing Commission; (2) ensure that when the report of the Sentencing Commission is distributed to anyone, the attached MDAA minority report is included; and (3) ensure that any judicial trainings include the perspectives of experienced prosecutors.

Your help and assistance would be appreciated.

Very truly yours,



Michael W. Morrissey
District Attorney

Enclosures

Cc (with enclosures):
Justice John T. Lu
Mary Alice Doyle, Esq., Deputy First Assistant District Attorney, Essex County
Brian S. Glenny, Esq., First Assistant District Attorney, Cape & Islands District
Melissa Nawrocki, Executive Director, Flaschner Judicial Institute

Morrissey, Michael (NFK)

From: Doyle, Mary-Alice (EAS)
Sent: Saturday, May 26, 2018 3:27 PM
To: Blodgett, Jonathan (EAS); Morrissey, Michael (NFK); OKeefe, Michael (CPI); Maguire, Tara (DAA)
Subject: Fwd: REMINDER; Meeting scheduled 05/16/18

Follow Up Flag: Flag for follow up
Flag Status: Flagged

Sent from my iPhone

Begin forwarded message:

> **From:** "Doyle, Mary-Alice (EAS)" <Mary-Alice.Doyle@MassMail.State.MA.US>
> **Date:** May 26, 2018 at 3:12:53 PM EDT
> **To:** "Blodgett, Jonathan (EAS)" <Jonathan.Blodgett@MassMail.State.MA.US>
> **Subject: Fwd: REMINDER; Meeting scheduled 05/16/18**
>
> Sent from my iPhone
>
> Begin forwarded message:
>
> > **From:** Jack Lu <jacklu1763@gmail.com>
> > **Date:** May 15, 2018 at 12:38:44 PM EDT
> > **To:** Elizabeth K Marini <elizabeth.marini@jud.state.ma.us>
> > **Cc:** "Bennett, Gretchen B (HOU)" <gretchen.bennett@mahouse.gov>, charles.anderson2@doc.state.ma.us, Debra A DelVecchio <debra.delvecchio@jud.state.ma.us>, Edward J Dolan <edward.dolan@jud.state.ma.us>, "Domoretsky, Brian (EPS)" <brian.domoretsky@mass.gov>, Peter Ettenberg <pettenberg@gouldettenberg.com>, Kim Faitella <kim.faitella@massmail.state.ma.us>, Pamela Friedman <pamela.friedman@massmail.state.ma.us>, Serge Georges <serge.georges@jud.state.ma.us>, "Glenny, Brian (DAA)" <brian.glenny@massmail.state.ma.us>, Mary Heffernan <Mary.Heffernan@jud.state.ma.us>, "Lord, Spencer B (PAR)" <spencer.b.lord@mass.gov>, Jack Lu <john.lu@jud.state.ma.us>, "Macfarland, Keith (HOU)" <keith.macfarland@mahouse.gov>, Maryheffernan <Maryheffernan@comcast.net>, Paul J McManus <paul.mcmanus@jud.state.ma.us>, Andrew E Peck <andrew.peck@jud.state.ma.us>, "Queally, Jennifer D (EPS)" <jennifer.d.queally@mass.gov>, David Solet <david.solet@mass.gov>, David Weingarten <david.weingarten@jud.state.ma.us>, daniel bennett1 <daniel.bennett@mass.gov>, catherine byrne <catherine.byrne@jud.state.ma.us>,

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Subject: Re: REMINDER; Meeting scheduled 05/16/18

Dear Sentencing Commission Participants:

I wanted to tell everyone what lies ahead for the Sentencing Commission. We have had a strong four-year run. It has included many frustrations but also many accomplishments and I am grateful to each and every one of you, without exception.

I expect to do something like this tomorrow:

Approve (or disapprove) substantive changes that Shira sent you a few weeks ago.

Possibly look at typographical corrections that are being made (and possibly not bother as the commission staff may best handle this).

Approve something like the following short-term plan.

On the 24th Mary Alice, Brian and Dean will submit the minority report. It does not require approval of the commission. I tentatively think it should go after the introduction. I expect to modify the introduction to address issues raised in the minority report in a similar fashion that a majority judicial opinion does so (The minority or dissent argues that: ' . . . " This misunderstands the issue because ". . . "

I expect to personally finalize the the Guideline "form" by May 25 or so. A pretty decent draft is available for review by anyone that requests it.

On May 25 we will submit the final to Flaschner for the judicial seminar a few weeks later. It appears that the version for the judicial seminar will just be a looseleaf. The version for the fall guidelines seminar will be for the general public and might or might not involve more formal publication. The submission of the Guidelines to Flaschner may constitute the last major substantive changes to the Guidelines for some time, and my participation a few weeks after expiration of my term may or may not be done by me in holdover status.

I have not determined whether I will seek renomination or if I would be renominated or reappointed. I know this seems tardy but I have a demanding day job like you. I did not mean to suggest by my previous email to Brian that I have decided to step aside.

Whatever happens it has been a real pleasure working with what I described in 2014 as the "best minds in Massachusetts criminal justice" referring to the members and staff that have attended our countless meetings. I fully stand by and reinforce that description. I consider each of you my friend whether or not we agree or disagree on sentencing policy.

Please enjoy the summer!

Jack

On Tue, May 15, 2018 at 10:13 AM Elizabeth K Marini <elizabeth.marini@jud.state.ma.us> wrote:

> Commission Members,
>
> Reminder meeting scheduled for Wednesday May 16, 2018 @ 2:30.
>
> Location: Three Center Plaza, 7th Floor, Boston, MA
>
> Parking Available
>
> Agenda will be sent in another email.
>
> Thank you
>
> ***Elizabeth K. Marini***
> ***Department of Research and Planning/Massachusetts Sentencing Commission***
> ***John Adams Courthouse - One Pemberton Square***
> ***Boston, MA 02108***
> ***phone: 617-788-6880***
> ***fax: 617-788-6885***

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Please note my new email address.

**** Statements or views are submitted for academic interest only and do not necessarily represent the opinion of the sender. They are not the position of any entity the sender is associated with. ****

**** This information may be confidential and/or privileged. Use of this information by anyone other than the intended recipient is prohibited. If you received this in error, please inform the sender and delete this message. Thank you. ****

May 24, 2018

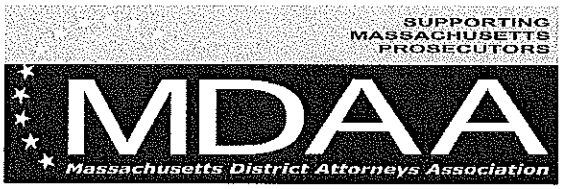
The Honorable John T. Lu, Chairman
Massachusetts Sentencing Commission
John Adams Courthouse
One Pemberton Square, G300
Boston, MA 02108

Dear Justice Lu,

Enclosed please find the Massachusetts District Attorneys Association's Minority Report to the Sentencing Commission's Report. Thank you for your assistance and assurance that the enclosed will be printed and released with the Commission's final report.

Sincerely,

Michael W. Morrissey
Norfolk District Attorney
MDAA, President



District Attorneys' Response to the Sentencing Commission 2017 Guidelines

Introduction

The Massachusetts District Attorneys Association hereby responds to the Sentencing Commission's November 2017 Advisory Sentencing Guidelines. Several District Attorneys testified in opposition to the Guidelines at Commission hearings on November 18, 2015 and October 19, 2016, and two Assistant District Attorneys are voting members of the Commission.

The Commission is "envision[ed by G.L. c. 211E] as an ongoing entity that would support, monitor, and assess the implementation of the sentencing guidelines legislation and report annually to the Legislature with recommendations for adjustments and improvements to the sentencing guidelines."[1] Under c. 211E, § 3(a)(1),[2] the Guidelines will "take effect *only if enacted into law*" (emphasis added). The District Attorneys understand that the Commission intends to issue the Guidelines to judges, but has not "recommended" the Guidelines to the Legislature for its consideration and enactment.[3] Id.

The District Attorneys strongly object to the Commission's plan to issue Guidelines to judges that have not received the approval and consent of the Legislature. The plan violates the Commission's statutory authority to "recommend sentencing guidelines, id., and it violates the Separation of Powers clause by undermining our constitutional roles, especially the role of the Legislature to enact laws related to criminal penalties.

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[1] https://www.mass.gov/info-details/massachusetts-sentencing-commission-commissioners #the-role-of-the-massachusetts-sentencing-commission- (last visited 5/17/18).

[2] "The commission, by affirmative vote of at least six members of the commission and consistent with all pertinent provisions of this chapter and existing law, shall recommend sentencing guidelines, which shall take effect only if enacted into law." G.L. c. 211E, § 3(a)(1).

[3] This may be why the Guidelines are "Advisory" and "not voluntary," although the meaning of this disclaimer is not understood or endorsed by the District Attorneys.

In general, the Guidelines:

- **advise shorter prison terms for most crimes**[4] (increasing the terms for 2 crimes), **shorter probationary terms** to be capped at 3 years and eligible for further reduction, even for sex crimes against children, and **fewer probationary conditions**;
- **create a presumption against consecutive terms**, even, for instance, where a defendant is convicted of multiple sex offenses committed over a period of years or sex offenses against multiple victims; and
- **limit the information available to judges** about a defendant's criminal history, *including continuances without a finding (CWOFs)*, even in domestic violence cases. Compare Acts of 2014, c. 260, § 40 (under the Act Relative to Domestic Violence, "*all* pending and prior criminal offender record information, board of probation records, and police and incident police reports related to the" defendant *must be* provided to judge or clerk during the bail process, including at a dangerousness hearing, that is, *even before a conviction or a finding of sufficient facts*) (emphasis added).

After a lengthy and comprehensive review, the District Attorneys opposed the Guidelines based on our collective experience, the rights of victims of crime, the impact of the opioid epidemic,[5] and our vital role as elected officials, protecting the public and representing the public's interest.

We respect the Commission's work of the Commission and its considerable efforts to address fairness and predictability in sentencing. In our view, however, the Commission's process and the resulting Guidelines are flawed in several important ways that are described below.[6] In brief, the Commission relied on outdated and flawed data, particularly as to recidivism, or no data at all, and developed Guidelines that disfavor victims of crime, jeopardize public safety, or are inconsistent with statutes.[7] This minority report is intended to bring those deficiencies to the attention of the Legislature, judges, and the public.

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[4] The Guidelines also create Level 0 for crimes as to which the Commission recommends "no fine, supervision, or incarceration of any kind."

[5] Nearly 2,000 people died in Massachusetts from opioid-related overdoses in 2017. https://www.mass.gov/files/documents/2018/02/14/data-brief-overdose-deaths-february-2018.pdf (1,977 deaths confirmed and estimated by the Department of Public Health).

[6] This response highlights only the District Attorneys' major concerns.

[7] The Guidelines are also inconsistent with the Superior Court Sentencing Best Practices for Individualized Evidence-Based Sentencing in that they expressly eschew the Best Practice of "stat[ing] orally or in writing the reasons for imposing a particular sentence."

The Commission's Process

1. **The District Attorneys do not accept the premise that Massachusetts is a mass incarceration jurisdiction.**[8, 9] In truth,
   - the Department of Correction reports a steady decrease in "criminally sentenced" inmates between January 1, 2012 (n=10,251, the 10-year peak) and January 1, 2017 (n=8,234),[10] when our DOC population was the lowest in a decade;[11]
   - Massachusetts had *the second lowest incarceration rate in the country* in 2016;[12]
   - according to "[a] 2014 study of all 50 states[. . .] Massachusetts had the lowest incarceration rate for all drug crimes in the nation — 30 people per 100,000 residents — and . . . the third-lowest drug arrest rate in the country of 156 people per 100,000[, b]ut . . . the 13th highest rate of drug overdose deaths in the country, 19 per 100,000 people";[13]
   - in 2016, we had the 8th highest drug overdose fatality rate in the country,[14] but according to the most-recently available statistics issued by the Massachusetts

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[8] "Mass incarceration" refers to an "*increase* in penal population" over "[r]ecent decades" (emphasis added), according to a statement entitled "*Sentencing Reform in an Era of Racialized Mass Incarceration*" submitted to the Commission in November, 2016 by two Ph.D candidates at Harvard University. https://scholar.harvard.edu/files/matthewclair/filed/winter_clair_sentencing_memo_11_1_16.pdf. Rather than an increase, Massachusetts has had a *decrease* over the past decade, as discussed in the text.

[9] A comparison of the rates of violation and incarceration in Massachusetts and other nations is not especially useful or statistically valid given factors like differing police to population ratios, variations among countries as to what conduct is treated criminally, and the ubiquity of firearms in the United States.

[10] http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrends-2016-final.pdf (p. 13).

[11] Id. (from "2008-2017," the total prison population . . . decreased 16%"). Remaining inmates "have arguably more deficits and challenges in terms of education, employability, criminogenic thinking, mental health, and substance abuse problems [and their] levels of risk to recidivate remain among those in the moderate to high ranges." Id.

[12] https://www.bjs.gov/index.cfm?ty=nps (last visited May 21, 2018).

[13] As reported in the Boston Herald on May 15, 2018. http://www.bostonherald.com/news/local_coverage/2018/05/state_low_in_drug_charge_jail_time_high_in_fatal_ods (last visited 5/18/18).

[14] https://www.cdc.gov/drugoverdose/data/statedeaths.html.

Trial Court, 34% of defendants charged with possession of a Class A substance (heroin) with intent to distribute *were not "ultimately incarcerated"*[15];

- just 41% of all Massachusetts "defendants convicted [in FY 2013] of offenses assigned to the 1996 sentencing guidelines grid" in both District and Superior court were "ultimately incarcerated." FY 2013 Survey of Sentencing Practices issued by the Massachusetts Trial Court.[16] https://www.mass.gov/files/documents/2016/08/oo/fy2013-survey-sentencing-practices.pdf; and
- additional protections for defendants exist vis-à-vis incarceration:
  - a defendant who considers his Superior Court sentence to be disproportionate (i.e., too high or because it is consecutive), has a right to appeal to the Appellate Division (G.L. c. 278, § 28B). See also Superior Ct. Rule 64. On the other hand, *the Commonwealth has no comparable right of appeal for disproportionately low* sentences;[17]
  - DAs administer diversion programs, including those that direct defendants into substance abuse or mental health treatment; and
  - specialty courts are specifically designed to address the unique needs of drug users, veterans, homeless defendants, and juveniles.

2. **The Guidelines are not reliably data-based:** The Guidelines purport to be data-based, using "a comprehensive evidence-based approach," but largely follow the 1996 Guidelines[18] *that were themselves not data-based and that were, in any event, never enacted by the Legislature*. For many crimes, the Commission simply reduced

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[15] As reported in the Boston Herald on May 15, 2018. http://www.bostonherald.com/news/local_coverage/2018/05/state_low_in_drug_charge_jail_time_high_in_fatal_ods (last visited 5/18/18). Likewise, nearly half (48%) of defendants charged with cocaine possession with intent to distribute *were not "ultimately incarcerated."* Id.

[16] The FY 2013 Survey of Sentencing Practices by the Executive Office of the Trial Court is the most recent such report available online.

[17] A recent Essex Superior Court case is illustrative. A defendant was sentenced to two years' probation after pleading guilty to possession of heroin with intent to distribute. The Commonwealth sought a 1-3 year committed term, but the judge imposed probation on the grounds that it was "a money crime," because the defendant was not an addict but sold drugs to support his family and because he faced immigration consequences resulting from the conviction. http://salemnews.com/news/local_news/judge-spares-heroin-dealer-from-jail/article_75203dcd0137-5914-9a17-cd9baf7d3e7.html (last visited 5/17/18).

[18] As noted, the 1996 Guidelines were never enacted. Moreover, they reflect an average sentence for a particular charge, without accounting for whether the sentence arose from a trial or a guilty plea (that would take into account factors like potential evidentiary issues, the absence of cooperative witnesses, or whether the victim was a child), or whether the sentence was agreed-upon or disparate, or any disparity among judges' sentencing practices.

the number of years of incarceration[19] or probation, or reduced the conditions of probation, and in some cases, eliminated a judge's ability to consider a defendant's criminal history by "erasing" prior convictions.

The Commission did so based on outdated or flawed recidivism data, or no data at all, and without an analysis of the impact on public safety. Importantly, the Commission was not presented with, and thus did not rely on, recidivism data about defendants who are: (1) on bail or (2) on pre or post-disposition probation, including GPS and/or HOPE/MORR probation.[20]

The Commission itself acknowledges that the Guidelines reflect "judgment calls," that is, the sentencing/criminal justice philosophies of some of its members. The Guidelines should have been based on data-driven, sound sentencing practices that are designed to carry out the Legislature's sentencing scheme, fairly, predictably, consistently, and swiftly, with an eye toward both public safety and rehabilitation.

As to the stale and misleading nature of the data that was considered, the Commission received a presentation *in November 2014* from the Probation Department that cited *2005* recidivism data. That data ranked six categories of crimes according to their seriousness, from most to least.[21] Those defendants who commit new crimes in the bottom categories ("Felony Property Crimes" (i.e., c. 266 crimes); "Felony Weapons, Drugs, or Others"; and "Misdemeanors") were discussed at Commission meetings as "low level" recidivists, even though c. 266 crimes include serious offenses like armed burglary and breaking and entering a dwelling and putting a person therein in fear, and felony weapons crimes under c. 269 include being a felon in possession. Similarly, "misdemeanors" include such serious offenses against victims as domestic assault and battery, violation of a restraining order, and strangulation, including of a household member or domestic partner.[22] In other

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[19] For example, the Guidelines reduce unarmed robbery (a life felony) to Level 4 (with a maximum 7.5 year term for a defendant with the most serious violent record).

[20] As to the significance of such data, a recent Essex case is instructive: the defendant was assigned to HOPE/MORR probation in October 2012 after being convicted of possession of a sawed-off shotgun and serving the committed portion of a split sentence. Less than two years later, while he was still on HOPE/MORR probation, he fatally shot a man and was later convicted of first-degree murder. While on probation, he was served with 19 violation notices, found in violation 18 times, held briefly, and reprobated. Among his violations were four new arrests and five drug/alcohol violations.

[21] The categories were: Murder or Manslaughter, Felony Sex Offense, Felony Robbery, Felony Aggravated Assault, Felony Property, Felony Weapons, Drugs, or Others, and Misdemeanors.

[22] Non-fatal strangulation has been found to be "associated with over seven-fold odds . . . of becoming a completed homicide," and is "an important risk factor for homicide of women."

words, some of the categories of crimes for purposes of measuring recidivism are misleading, and will result in misclassification of defendants' recidivism risk.

3. **Dissemination of Guidelines without legislative approval:** During the process, the Commission submitted proposals to the Legislature for its consideration. See Commission letter, June 16, 2017, proposing, among other things, the "[a]bolition of all mandatory minimum" sentences except for murder and the "[p]assage of a safety-valve provision for all offenses except murder." Neither of these proposals, or most of the other recommendations, was enacted in the 2017 Crime Bill.

   Now, the District Attorneys understand that the Commission has chosen to disseminate the Guidelines directly to judges, without formal review, debate, and vote by the Legislature. We object to the use of the Guidelines absent meaningful legislative review and oversight.

4. **District Attorneys' proposals to the Commission:** The DAs asked the Commission to recommend to the Legislature the Governor's wiretap proposal and the abrogation of the marital privilege in cases of domestic violence, which would have provided additional protection for victims of domestic violence. The Commission declined to make either recommendation.

   The DAs also made an oral recommendation to the Commission to increase penalties for subsequent-offense OUI convictions. The Commission did not vote on this proposal. We are pleased to report, however, that the DAs' proposal was enacted by the Legislature, demonstrating the public's desire for increased protection from the scourge of drunk drivers.[23]

5. **The Guidelines' recommendation to dispense with the requirement of c. 211E, § 3(h):** Under c. 211E, § 3(h), a judge who departs from the Guidelines must do so in writing. The Guidelines dispense with this statutory requirement without citing any authority for this directive. Written-findings are a valuable tool for ensuring public accountability. It is by no means clear that the Commission has authority to dispense with the statutory requirement, or that it is a good idea to do so.

Journal of Emergency Medicine, 2008 October 35(3): 329-335 (this is a widely-cited study that may be found at https://www.ncbi.nim.gov/pmc/articles/PMC2573025/ (last visited 5/15/18). "Today, it is known unequivocally that strangulation is one of the most lethal forms of domestic violence." G. Strack and C. Gwinn, *On the Edge of Homicide: Strangulation as a Prelude*, Criminal Justice, Vol. 26, No. 3, Fall 2011, published by the American Bar Association.

[23] Commonwealth v. Blais, 428 Mass. 294, 298 (1998) ("A drunk driver let loose on the highways is a deadly menace, not only to the officer, but also to anyone sharing the highways with him").

Specific objections by the District Attorneys:

Apart from concerns expressed at the public hearing on November 18, 2015, and expressed throughout the process by the Assistant District Attorneys who are Commission members, we have identified several specific concerns with the Guidelines as follows:

1. The combined effect of shorter committed terms, shorter periods of supervision on probation, and fewer conditions of probation can have a disastrous effect. Several recent fatal shootings of police officers and a fatal strangulation are illustrative.

    - Woburn Police Officer John Maguire, age 60, was shot to death in 2010 by Dominic Cinelli, who was on parole for second-degree murder after having been convicted of shooting a security guard during an armed robbery.

    - Auburn Police Officer Ronald Tarantino, Jr., age 42, was shot to death during a motor vehicle stop in 2016 by Jorge Zambrano, who had a 11-page record, was on probation for assault and battery on a police officer, and had violated "probation by testing positive for cocaine on multiple dates." http://www.masslive.com/news/worcester/index.ssf/2016/05/judge_warns_jorge_zambrano_three_months_before_shooting.html#incart_river_home (last visited 5/17/18). He had previously served seven years in prison for drug and other crimes. http://www.telegram.com/news/20160522/jorge-zambrano-suspect-in-auburn-police-officers-slaying-had-long-criminal-history (last visited 5/17/18).

    - Yarmouth Police Officer Sean Gannon, age 32, was shot to death in April, 2018 while serving an arrest warrant on Thomas Lantanowich, who is awaiting trial for the shooting. After being paroled from a 4-5 year state prison term for assault with a dangerous weapon and related gun charges, he was on probation for multiple charges, including threatening to commit a crime, intimidation of a witness, drug, firearms, and other offenses. According to the Cape Cod Times, "[r]ecords . . . show he has been arraigned on more than 80 charges in Barnstable and Orleans district courts since 2005. The charges run the gamut of criminal activity, including drug possession and trafficking, firearms possession, armed robbery, bombing and hijacking threats, strangulation, assault and battery with a dangerous weapon, and vandalism." http:// capecodtimes.com/news/20180413/suspect-in-killing-of-yarmouth-officer-sean-gannon-held-without-bail (last visited 5/17/18).

    - Eugene Cole, a Corporal in the Somerset County Sheriff's Office, Maine, age 61, was shot to death in April, 2018 in Maine by John Williams, who has an open firearms case in Massachusetts for which bail had been set at $7500 in District Court, but lowered to $5000 in Superior Court.

- Brian Chevalier is awaiting trial for the strangulation murder of Wendi Rose Davidson, age 49, in April, 2018 in North Andover. Chevalier had been released on parole in New Hampshire only a few months earlier, having served a portion of a maximum 30-year sentence for kidnapping a woman.

2. The Guidelines create a risk to public safety in several ways, apart from the fact that the presumptive sentence range for some crimes is lower than the statutory limits or the 1996 Guidelines:[24]

   - they deprive the judge of highly relevant information about a defendant's criminal history,[25] including CWOFs and certain prior convictions[26];
   - by creating a presumption of concurrent sentences, they disfavor sentences for each conviction for multiple offenses by limiting a sentence for all convictions, including probationary terms, *to the recommended range for the lead charge only*; and
   - they cap probation at three years, regardless of the crime, the facts surrounding it, or the defendant's rehabilitative needs,[27] and they include the probationary term within the overall maximum recommended sentence as noted in the previous bullet.

3. **For some crimes, the entry of a sentence within the grid range would be a departure from the applicable statute.** For example:
   - Aggravated rape of a child (without force) (Level 8) (G.L. c. 265, § 22A):
     mandatory minimum term: 10 years
     maximum on the grid for defendant with no record: 90 months (7.5 years)

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[24] As noted, unarmed robbery, a life felony (G.L. c. 265, § 19), has a presumptive range under the Guidelines of 60-90 months for a defendant with the most serious violent record. Therefore, imposition of a lawful sentence (i.e., life) would be a departure under the Guidelines.

[25] This limit on criminal history information is contrary to the Legislative intent of providing more information, not less. For example, under the Act Relative to Domestic Violence, c. 260 of Acts of 2014, "*all* pending and prior criminal offender record information, board of probation records, and police and incident police reports related to the" defendant must be provided to judge or clerk during the bail process, including at a dangerousness hearing) (emphasis added). This information, which is relevant pretrial, is certainly relevant is fashioning a disposition.

[26] CWOFs, with and without probation, are a common district court disposition. The Guidelines do not explain why this highly probative information should be ignored.

[27] For anger management, sex offender treatment, substance abuse treatment, or domestic violence programming, for example.

In other words, the maximum sentence within the presumptive sentence range for some crimes is below the statutory mandatory minimum. For example, under the Guidelines, a 6-8 year term would be a permissible sentence for aggravated rape of a child, *even though the statute imposes a 10-year mandatory minimum term*.

- OUI-8th offense (Level 5) (G.L. c. 90, § 24)
  mandatory minimum term: 3.5 years; maximum: 8 years
  maximum on the grid: 90 months (7.5 years)

  In other words, the entry of the maximum sentence for an 8th offense OUI (8 years) would be a departure under the Guidelines.

4. **Criminal history**: Our appellate courts have long-acknowledged the importance of a defendant's criminal history in fashioning an appropriate sentence.[28] There can hardly be a more probative indicator of whether a defendant has reformed his criminal thinking and his capacity for rehabilitation than his criminal record and the effect of previous intermediate sanctions. Therefore, information about a defendant's entire criminal history, including CWOFs and any intermediate sanctions previously imposed, must be taken into account in tailoring a sentence that will both protect the public and serve a defendant's rehabilitative needs. If anything, a judge should have more information, not less.

   For this reason, the Superior Court Best Practices state that "a judge should consider the following factors . . . a defendant's prior criminal record." The Best Practices contain no limitation on this inquiry. Unlike the Guidelines, they contain no "erasure" of convictions by gap or decay provisions (see below) and they do not preclude consideration of CWOFs.

5. **"Gap and Decay"[29] erasure of certain convictions from the sentencing calculation:** The Guidelines argue for individual sentencing, but then "erase[]" from the judge's consideration certain prior convictions from the sentencing calculation under a so-called "Gap and Decay" provision. Specifically, the Guidelines "erase" all offenses 8 years from arraignment, except for Level 6 or above offenses if the governing offense is also Level 6 or above. The Guidelines also permit the judge to shorten (or lengthen) the 8-year period, but do not provide any guidance for doing so. These

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[28] Prior convictions have other permissible uses, such as impeachment and as predicates for a Sexually Dangerous Person petition.

[29] The introduction to the Guidelines references "a Gap and Decay provision" in Step 4/Chapter 4, but these are, in fact, two different policies. See http://robinainstitute.umn.edu/publications/criminal-history-enhancements-sourcebook, at 33, 34 (discussing "enact[ment]" of either a decay or gap policy" and discussing the "[d]ecision [b]etween [d]ecay and [g]ap."

provisions are contrary to Melanie's Law, which created a lifetime look-back in OUI cases. G.L. c. 90, § 24.

Of the eighteen jurisdictions analyzed by the Robina Institute of Criminal Law and Criminal Justice of the University of Minnesota Law School[30] in 2015, only "three . . . have enacted a decay policy, so that once a defined period has passed, the prior conviction is no longer counted for criminal history purposes," regardless of whether the defendant has remained crime-free, and only "[s]ix . . . have enacted a gap policy, requiring the offender to remain crime free for a specified period of time before an offense will be removed from or discounted in the criminal history calculation." http://robinainstitute.umn.edu/publications/criminal-history-enhancements-sourcebook, at 29 (last visited 5/17/18). *Each of these jurisdictions has a higher incarceration rate than Massachusetts.*

Of the few jurisdictions that have enacted gap or decay provisions, most have "multiple defined periods" reflecting different levels of seriousness of crimes (as do the Guidelines[31]); some have 15-year periods, but "the most commonly used period is 10 years," according to the Robina Institute. Id. at 29, 31. By contrast, *the Guidelines impose an 8-year look-back*, which the judge may shorten. The Commission did not consider any data when selecting this look-back period. See id. at 34. (recommending that "[a] commission utilize existing empirical research . . . or replicat[ion of] such research with its own population to establish an appropriate decay or gap period"). And, indeed, "the risk predictive value of [look-backs] has . . . rarely been validated," according to the Robina Institute. Id. at 97.

As for the starting point of the gap or decay period, "[m]ost jurisdictions begin counting the period upon discharge from sentence, meaning *when any incarceration time has been served and probation or post-confinement supervision has ended.*" Id. at 31 (emphasis added). "As a result, the period of time that an offense will count . . . is the period of the sentence plus the defined decay or gap." Id. In Minnesota, for example, given the average length of terms of imprisonment, this would amount to a nearly-19-year period for most felonies and a 22-year period for drug crimes. The Guidelines, by contrast, use the arraignment date, i.e., the shortest possible period.

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[30] "The Robina Institute . . . brings legal education, legal and sociological research, theory, policy, and practice together to solve common problems in the field of criminal justice, . . . [including] Sentencing Law and Policy." Id. at 3.

[31] The exception to the 8-year look-back is for Level 6 or higher offenses, if the governing offense is Level 6 or higher.

It appears that no other jurisdiction uses the arraignment date;[32] and there is no sound reason for doing so. Use of the arraignment date encourages both defaults and delays, such as for the appointment of new counsel, and/or a competency determination or criminal responsibility determination.

Furthermore, other jurisdictions have revival policies (for convictions that are erased under decay or gap provisions), but the Guidelines do not. Id. at 32-33.

Criminal history is a powerful indicator of a defendant's risk of recidivism, amenability to rehabilitation, and his treatment needs. Defendants who have criminal records should not be treated like defendants who do not. If a conviction is too old to be relevant, a judge has discretion to discount it. But if it is relevant, it should be counted, not "erased" as provided in the Guidelines. Judges should not be deprived of this tool by any form of gap or decay, particularly where this provision has not been vetted by the Legislature.

6. **Multiple convictions/presumption favoring concurrent sentences based on the governing offense:** The Guidelines disfavor consecutive sentences for convictions arising from the "same criminal conduct," regardless of the number of crimes against a single victim or the number of victims. With the exception of a rebuttable presumption that prior convictions with the same arraignment date arose from the "same criminal conduct," the term is not otherwise defined, including whether the term encompasses crimes committed on different dates.

   The "multiple offense" provision:

   - is unsupported by any data suggesting that consecutive sentencing is an overused or unfair sanction;
   - conflicts with G.L. c. 279, § 8B, which requires a consecutive sentence for crimes committed while a defendant is on release under c. 276, § 58; and
   - ignores the trauma and impact of multiple crimes committed against one victim, or the fact that crimes were committed against multiple victims, or the harm to individual victims in a multi-victim cases, thus rendering individual indictments and convictions meaningless.[33]

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[32] Id. at 31.

[33] For example, under the Guidelines, a conviction for one count of rape of child (Level 6), calls presumptively for a 40-60 month term. If a defendant was also convicted of rape of a second child arising from the same criminal episode, the Guidelines would call for the same sentence; consecutive sentences would be permitted only if they fall with the recommended range for one conviction).

Under this provision, "multiple offense convictions resulting from the same criminal conduct . . . " are to be governed by the lead offense. Therefore, a defendant who is convicted of raping two victims on two different dates could receive consecutive sentences, ONLY if the sentences are within the range for *one* victim. Similarly, if a defendant rapes, then pistol whips, then indecently assaults a victim, the sentence would be within the Guidelines ONLY if it does not exceed the sentencing range for rape.

Furthermore, the Guidelines also create a presumption that incarcerated terms and probationary terms together are not to exceed the maximum sentence range. In other words, a sentence would be a departure under Guidelines if the committed term plus the probationary term exceed the maximum for the governing offense.

These results ignore the basic goals of any sentencing scheme in which sentences are tailored to the crime and in which victims are fairly considered.

7. **Length of probation**: The Guideline disfavoring lengthy probationary terms removes a useful tool from judges. Moreover, the 3-year cap on probation is not based on any data, particularly as to the impact on public safety. In fact, in a 21-state study of probationary terms by the Robina Institute in 2014, the maximum probationary term in 15 states was longer than 3 years for felonies; in 4 of those states, the maximum period was the same as the maximum term of incarceration; and the most common length among all 21 states was 5 years, which is the maximum in 8 of the 21. https://robinainstitute.umn,edu/publications/data-brief-probation-depth-length-probation-sentences. Indeed, it is noted in the Introduction and Overview of the Superior Court Best Practices that "sex offenders" do not fall in the general rule that "probationers . . . who are inclined to commit further crime usually do so in the first two years of probation," citing "Pew Charitable Trs., Pew-Macarthur Results First Initiative, Massachusetts' Evidence-Based Approach to Reducing Recidivism," at 3-4 (Dec. 2014). The Guidelines' limitation on the length of probation does not take any of this into account.
   Furthermore, it is particularly concerning that the Guidelines aggregate the probationary term with the committed term when calculating whether the sentence for all convictions falls with the maximum range on the grid as described above.

8. **Mandatory minimum sentences:** Predictability and consistency are key components of an effective sentencing scheme that protects public safety, as the Guidelines recognize. Mandatory minimum sentences were enacted in an effort to increase predictability and consistency for certain offenses, including sex crimes against children, subsequent firearms offenses, subsequent OUI offenses, and trafficking-weight drug offenses. Recently, the Legislature signaled its continuing support for mandatory minimum terms, establishing such a term for trafficking in 10 grams or more of any mixture containing fentanyl, even while eliminating some (for some drug offenses) and retaining others (school zone violations).

Crimes with mandatory minimum sentences are violent, or repetitive, or have a particularly devastating effect on our communities. As District Attorney Gulluni explained to the Board at the public hearing on November 18, 2015, drug traffickers profit from addiction and drive much of the violence in our communities.

Of the DOC inmates incarcerated for a governing drug offense on January 1, 2014 (n=1,467), 73% had a history of violence or firearms; collectively they had a total of 58,690 arraignments for an average of 40 arraignments per inmate.[34] As of January 1, 2017, the number of such inmates had fallen (n=1,217), but more inmates (74%) had a history of violence or firearms, and they accounted for even more arraignments per inmate (n=51,649), for an average of 42 per inmate.[35]

It is not clear, and the Board does not explain, how the abolition of mandatory minimum terms for drug traffickers will help slow the opioid epidemic.

9. **"Deep police presence":** the Guidelines authorize downward departures based on a "deep police penetration into minority and/or poor neighborhoods [positing that it] may increase an individual's criminal history for certain offenses." The DAs do not support the provision for several reasons:
   - it may be unconstitutional because it ties sentencing to a defendant's address;
   - it ignores the fact that many police departments use computer analysis to share intelligence and direct resources to areas where violent crime is occurring[36]; and
   - downward departures provide less protection to a community; the Commission does not explain why a community with a "deep police presence" is entitled to less protection from offenders than other communities.

   Sentencing decisions should not be based on the address of the defendant or the address of the crime. In short, this provision may be unconstitutional and is not, in any event, an appropriate mitigating circumstance.

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[34] According to information presented to the Committee by the Massachusetts District Attorneys Association.

[35] It is worth noting that more than half of the inmates with a governing drug offense had a *history of violating probation* (60% in 2014 and 55% in 2017) and more than a third had a *current or prior restraining order* (36% in 2014 and 39% in 2017).

[36] For example, in a case just decided on appeal, police were directed to a location of three armed robberies based on information received from Shotspotter, "an automated acoustic device used by the Boston police department to detect and locate gunshots," *even before 911 calls were received*. Commonwealth v. Jose Mercado, Appeals Ct. No. 17-P-167 (May 7, 2018).

In closing, criminal justice issues are an abiding concern for the District Attorneys. We are proud of the work of our staffs to prosecute cases fairly and justly, with an eye to public safety. We appreciate the opportunity to set forth the reasons for our opposition and thank the Commission for including this response in the Guidelines.

APPROVED AND RESPECTFULLY SUBMITTED:

Massachusetts District Attorneys Association May, 2018